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No. 449

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOSEPH STACHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 23–42) is reported at 258 F. 2d 112.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1958. A petition for rehearing was denied on September 11, 1958. The petition for a writ of certiorari was filed on October 14, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the courts below properly found that petitioner was a resident of California at the time the

suit for cancellation of his certificate of naturalization was instituted against him.

2. Whether Rule 4 (d) of the Federal Rules of Civil Procedure, prescribing the methods by which "personal service" may be effected, is applicable to the requirement of personal service in a denaturalization proceeding.

3. Whether the finding that petitioner intentionally and willfully misrepresented that he had never been arrested was supported by clear and convincing evidence.

STATUTES AND RULE INVOLVED

Section 101 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1101 (a) (33)) provides:

> (a) As used in this Act—
>
> * * * * * *
>
> (33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 350 and 352 of title III where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.

Section 340 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1451) provides in pertinent part:

> (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in

subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *

(b) The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

Rule 4 of the Federal Rules of Civil Procedure provides in pertinent part:

* * * * * *

(d) *Summons: Personal Service.*—The summons and complaint shall be served together. The plaintiff shall furnish the person making

service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

* * * * * *

(e) *Same: Other Service.*—Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

STATEMENT

On February 2, 1953, a complaint was filed in the District Court for the Southern District of California seeking revocation of the certificate of naturalization issued to petitioner on May 12, 1930, by the District Court for the District of New Jersey, (R. 3–10, 154–161). After trial without a jury, the district court found that petitioner had made willful misrepresentations in the naturalization proceedings by denying that he had ever been arrested (R. 206–215). Judgment setting aside petitioner's naturalization pursuant to § 340 of the Immigration and Nationality Act of 1952, *supra*, pp. 2–3, was entered accordingly (R.

215–217).[1] The court of appeals affirmed (Pet. 23–42). The facts relevant to the issues presented here are as follows:

1: *Jurisdiction and venue.*—On February 3, 1953, when petitioner was in Las Vegas, Nevada, the complaint and summons were served upon him by leaving a copy with his wife at 721 No. Beverly Dr., Beverly Hills, California, which was alleged in the return on service of writ to be "the dwelling house and usual place of abode" of petitioner (R. 11–12). Petitioner moved to quash the service and to dismiss (or transfer) the action on grounds of improper venue, alleging that he was then a resident of Nevada for purposes of the venue and service provisions of § 340 (a) and (b) of the Act (R. 12–18). On the basis of affidavits filed by the parties (R. 18–39), the court found that petitioner resided in Beverly Hills and denied the motions (R. 40–41). The issue was renewed at the trial and extensive evidence was introduced. The evidence is set forth in detail in the court of appeals' opinion (Pet. 29–33, nn. 11–12). In main outline, it showed the following: In

[1] The amended complaint stated two "causes of action", one for concealment, and the other for misrepresentation, of material facts (R. 154–161). Both were sustained by the district court and affirmed by the court of appeals. However, since both claims were based on substantially identical facts and either claim is sufficient to support the judgment, the discussion in this brief will for convenience be limited to the "misrepresentation" claim.

The complaint also alleged concealment and misrepresentation of facts other than the petitioner's prior arrests (use of aliases and facts relating to moral character), but the district court made no findings on those allegations and they will not be discussed here.

June 1950, petitioner took his family from their home in New Jersey to Reno, Nevada (R. 680). In November 1951, petitioner and his wife leased a house for six months in Palm Springs, California (R. 255, 551–554, 697, 682). In April 1952, they leased for a year (at $10,000) the house in Beverly Hills, California, at which the service of process was made (R. 558–562, 688–694; Govt. Exh. 27). From November 1951 until the initiation of the instant proceeding, petitioner's wife and children resided continuously in California, first at the Palm Springs home and then at the Beverly Hills home (R. 553, 558–562). During this period petitioner spent at least two months each year with his family in California and spent the rest of his time in Nevada. In Reno, he stayed with friends and at hotels. In Las Vegas, to which he moved in May 1952, he stayed in varying rooms at the Desert Inn Hotel. Petitioner owned interests in business property in Reno and Hollywood, but had no business in Las Vegas. (Pet. 29–33). Petitioner admitted that he was residing in California at the date of the trial (R. 681).

2. In his answer to the complaint, petitioner admitted that he had been arrested seven times during a five-year period preceding his naturalization but claimed that he had not denied those arrests in the naturalization proceedings (R. 43–44).

The Government introduced into evidence the "Preliminary Form for Petition for Citizenship" filed by petitioner on September 16, 1929 (R. 413–414, Govt. Exh. 4). Question 27, which read, "Have you ever been arrested or charged with violation of any law of

the United States or State * * *?" was answered "No" in longhand and the form was signed by petitioner. Petitioner testified that one Emil Kemeny, who had advised and assisted him in obtaining his citizenship, had prepared the "Preliminary Form" for him and that he had signed it without reading it or knowing its contents (R. 669–670). Petitioner's sister testified, by deposition, that she had assisted Mr. Kemeny in preparing the "Preliminary Form" and had told him that petitioner had never been arrested (Zwillman, R. 355). A retired county detective testified, by deposition, that he had observed petitioner sign the "Preliminary Form" at the request of Mr. Kemeny without reading it (Sklarey, R. 386).

The Government also introduced into evidence the triplicate form of the "Petition for Citizenship" filed by petitioner (Govt. Exh. 7). In the space provided on the form under the heading "Result of Examination," there appeared in longhand the notations: "Abs: No. Arr: No. Read: OK. Eng.: OK. Govt: Fair.—F. W: B." F. W. Braden, the naturalization examiner who had conducted the examination of petitioner on January 22, 1930, testified that the notations were his and that the notation "Arr: No" meant that he had asked petitioner whether he had ever been arrested and that petitioner had answered "No" (R. 410). Although admitting that he had no personal recollection of petitioner's examination, he also testified that it was the consistent practice of himself and other examiners to ask applicants whether they had ever been arrested (R. 454).

Petitioner testified that in the oral examination before Braden, Bradgn had given him a reading test and had asked him various questions about the form of government but had not asked him whether he had ever been arrested (R. 672–673). A friend of petitioner who attended the examination testified, by deposition, that he heard Braden ask petitioner to identify his signature but that he could not "remember offhand" whether Braden asked any other questions (Bateman, R. 936). He "did not" hear Braden ask petitioner whether he had been arrested but he "would have heard" the question had it been asked (R. 936). On cross-examination, he admitted that he didn't remember whether petitioner was asked any questions other than his name (R. 941–945). Petitioner submitted seven depositions concerning questions asked of four other applicants in naturalization proceedings before Braden during 1929, 1930 and 1931. One applicant was directed by Braden to answer the question about arrests on the preliminary form and was orally questioned about the arrest he disclosed (Friedlander, R. 862, 868), but his witness heard no questions about arrests (Isenberg, R. 949, 956). One applicant was "positive" that he had not been asked about arrests (Golub, R. 920–921). Neither of the other two applicants (Diamond, R. 885, 887; Berger, R. 895–897) nor their witnesses (Cassell, R. 874; Seigle, R. 904–906) could remember whether the respective applicant was asked about arrests, although one of the witnesses (Cassell, R. 873) stated that he was himself asked whether he had been arrested.

In its findings of fact, the district court found that Braden had asked petitioner whether he had been arrested and that petitioner, knowing the answer to be false, had answered "No" (R. 209); that petitioner had signed the Preliminary Form knowing the answer to Question 27 (arrests) to be false (R. 209); and that petitioner's naturalization order was "procured by willful misrepresentation in that defendant in the proceedings which led to his naturalization intentionally and falsely represented that he had never been arrested" (R. 212). The court of appeals, after an extensive review of the evidence, found that "the evidence is clear, unequivocal and convincing—evidence that does not leave the issue in doubt—that false answers were given by Stacher, and on his behalf and in his presence, to the naturalization examiner, and that Stacher received his naturalization certificate illegally" (Pet. App. 40).

ARGUMENT

1. Petitioner contends that, at the time the complaint was filed and served, he was a resident of Nevada and not of the Southern District of California and hence the venue was improper and the service ineffective. The issue is solely one of determining on the particular facts, and in view of petitioner's divided contacts with California and Nevada, petitioner's principal place of abode in February 1953, and presents no issue appropriate for review by this Court.

a. Petitioner's contention that the courts below failed to apply the Immigration Act's definition of "residence" as the "principal, actual dwelling place in fact, without regard to intent" (§ 101, *supra*, p. 2) is

unfounded. To the contrary, both courts below expressly adopted that definition (R. 206–208; Pet. 19, 28) and found that petitioner's "principal, actual dwelling place" was the $10,000-a-year home he had leased in Beverly Hills—where his family lived and where he lived when he was not, for obscure reasons (see R. 257–258), in Las Vegas, Nevada—and not the numerous rooms at the Desert Inn Hotel in Las Vegas in and out of which he intermittently moved.

b. There is no merit to petitioner's argument, articulated for the first time in his petition for rehearing in the court of appeals, that the venue and jurisdiction of the court in a denaturalization proceeding must be established by the same standard of proof (clear, convincing, and unequivocal evidence) as is required on the merits to set aside the judgment of the court originally granting citizenship. That standard originated from the standard of proof required in equity to annul or reform a written instrument for fraud or mistake (see *Maxwell Land-Grant Case*, 121 U. S. 325, 381) and has its justification in the respect owing to a final court judgment; one who attacks a final judgment of a court must show its defect by more than a mere preponderance of the evidence. See *Schneiderman* v. *United States*, 320 U. S. 118, 135. Clearly, therefore, it is only to issues tending to impeach the judgment attacked that the more stringent standard applies, and there is nothing in the nature of a denaturalization proceeding that requires that the jurisdiction of the court in which the proceeding is brought be governed by standards of proof any different from those governing jurisdiction in any other kind of proceeding.

Petitioner draws support for his view from the dictum in *United States ex rel. Stabler v. Watkins*, 188 F. 2d 883, 885 (C. A. 2)—unsupported by a consideration of the origin or purposes of the doctrine—that "we can conceive of no reason for accepting less clear proof as to the court's jurisdiction" in a denaturalization proceeding than is required on the merits in such a proceeding. That case, however, is fully distinguishable on the facts. While Stabler was imprisoned in Michigan, a denaturalization proceeding was brought in New Jersey on the basis of an affidavit stating (p. 884) that the affiant had "been advised" by a Justice Department official "who purported to know of defendant and his whereabouts" that Stabler's last residence before his imprisonment was in New Jersey. Stabler did not appear in the action and a judgment of denaturalization was entered by default. When Stabler was later interned as an enemy alien, he brought a habeas corpus proceeding challenging the denaturalization order on the ground that his "last residence" had been in New York and not in New Jersey. The court held that the default judgment, based on a mere hearsay affidavit of residence, could be so attacked and remanded the case for a determination of Stabler's residence at the time of the New Jersey proceedings.

Whatever the apparent breadth of the court's dictum in *Stabler*, its holding was the limited one that a default judgment of denaturalization entered without clear proof of jurisdictional facts can be collaterally attacked by showing the lack of jurisdiction. The court's holding, indeed, was quite inconsistent

with petitioner's theory. Under petitioner's theory, the lack of clear proof of jurisdiction in the New Jersey proceeding would in itself have voided the New Jersey judgment and required that habeas corpus be granted. The court instead remanded the case for determination de novo of the issue of residence, thus requiring that the New Jersey judgment be given recognition unless Stabler established as a fact that he had not been resident in New Jersey. The court's holding was not that clear and convincing proof of residence was a jurisdictional prerequisite in naturalization proceedings, but only that the jurisdictional basis of a *default judgment* may be relitigated absent clear proof thereof in the defaulted proceedings. That decision, we submit, was based on considerations peculiar to the protection of the rights of citizenship against loss by default and very different from those governing the standard of proof in litigated cases.[2]

[2] In addition, it may be noted that in the *Stabler* case the objection was to the absence of competent proof even as to the evidentiary facts of residence. In this case, there is no significant dispute over the evidentiary facts as to petitioner's whereabouts or his contacts with the two jurisdictions and the only question is that of applying the statutory definition of residence to the established facts by characterizing the contacts with one of the jurisdictions as predominant. While that process of applying a legal standard to admitted facts is denominated for some purposes as a "fact" determination, it is not a question to which the "clear and convincing proof" standard may readily be applied. But whether or not that standard could be so applied, the most that the dictum in *Stabler* can be read as saying is that the evidentiary facts of residence must be shown by clear proof. Thus there is no conflict even if *Stabler* is given the broadest possible reading.

2. If petitioner was a resident of California, it follows, contrary to petitioner's final jurisdictional argument, that personal service was properly made upon him. Section 340 (b) of the Act requires that the defendant in a denaturalization proceeding be given "personal notice" of the proceedings and provides that if he is absent from the jurisdiction of his residence "such notice shall be given either by personal service upon him or by publication". (*supra*, p. 3). Rule 4 (d) of the Federal Rules of Civil Procedure provides in turn that personal service may be effected:

> Upon an individual * * *, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein * * *.

Service upon petitioner's wife at their residence in Beverly Hills clearly satisfied these requirements and constituted personal service upon petitioner.

3. On the merits, petitioner attacks the sufficiency of the evidence to support the findings below. Even accepting petitioner's explanation of the misstatement in the Preliminary Form signed by him (that he had not read it), there remains a single controlling issue of fact: whether in the oral examination Braden asked petitioner if he had been arrested and whether petitioner answered "No." Applying the standard of clear and convincing evidence (R. 803), the district court expressly found that the question had been so asked and so answered (R. 209). The court of appeals, aware of the heavy burden on it in reviewing

denaturalization orders and of the stringent standards to be applied, made an extensive review of the entire record and found the findings supported by clear, convincing, and unequivocal evidence which did not leave the issue in doubt (Pet. 31–40). Both courts properly discharged their functions and there is no occasion for further review of the evidence by this Court. That evidence, in all events, fully supports the judgments below.

Braden, a disinterested witness, testified that the notations made by him on petitioner's "Petition for Citizenship" meant that he had asked petitioner the questions and received the answers indicated, among them being the question concerning arrests. He testified in addition that, although he did not recall petitioner's examination, it was his consistent practice to ask those questions of applicants. The depositions of seven persons involved in other proceedings before Braden, offered by petitioner apparently to show departures by Braden from that practice, were patently inconclusive (see the Statement, *supra*, p. 8). In substance, the only evidence offered by petitioner to overcome Braden's testimony and the contemporaneous memorandum of the proceeding made by Braden was petitioner's own self-serving denial that he had been asked the question. Petitioner's credibility and the weight to be given to his testimony were matters for the trial judge to appraise, and his rejection of petitioner's testimony was obviously justified. Indeed, apart from his denial that he was asked about prior arrests, petitioner's testimony tended to corroborate Braden's, for it confirmed that Braden had in fact

examined him on at least two of the five matters reflected in Braden's notations.[3]

Petitioner's attempt to inject into the case a separate issue of willfulness is without merit. If petitioner, with seven admitted arrests within the preceding five years, answered "No" to a question whether he had ever been arrested, the answer was necessarily knowingly false and a willful misrepresentation, as the district court expressly found. Similarly, since the district court found that petitioner's naturalization had been procured by a willful misrepresentation—*i. e.*, "fraud," which was admittedly a ground for denaturalization at the time petitioner was naturalized—the question whether the 1952 Act authorizes denaturalization for unintentional concealment, and if so whether it is constitutional, is not presented.

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[3] The five notations made by Braden under "Result of Examination," as translated by Braden (R. 410–411), were: (1) Absent from country since arrival?—No; (2) Arrests?—No; (3) Read—O. K.; (4) Speak English—O. K.; and (5) Knowledge of government—Fair. Petitioner testified that Braden had asked him to read a printed card and had asked him various questions about the government (R. 672–673). The appraisal of petitioner's English-speaking ability, of course, did not require a question, and petitioner was not specifically asked, in the trial of this case, whether Braden had inquired about absences from the country. Thus the only conflict in the testimony was over the specific question concerning arrests.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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